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must be noted in this situation that the trust is irrevocable until the settlor's death, because the members of the class are not fully determined until that time, and it is, therefore, impossible to have them all before a court until the instant of the life cestui's death.

The case seems hard upon the settlor, but she is in the same position as one who has made a valid gift. In such a case the donor cannot afterwards demand a return from the donee. Here the donor made a gift of equitable estates by means of an executed valid trust, and should not be allowed to revoke her gift because later she became dissatisfied with what she had done.⁷

R. S. M.

WILLS: REPLICATION BY CODICIL: EFFECT THEREOF.—In California the will of a man is not as is the case of the will of a woman¹ revoked ipso facto by his marriage, but remains in a state of suspended animation, becoming void only in the event that the wife survives the husband.² Before such time, if the will is confirmed or republished by a codicil, it becomes a post nuptial will and therefore is not revoked by the predecease of the husband. The reason for this was expressed in *Estate of Cutting*,³ which, adopting the words of the earliest California case on the subject,⁴ declared that the ante-nuptial will and the codicil "are to be regarded as forming but one instrument, speaking from the date of the codicil."

The principal case was strictly a case of republication, as distinguished from revival or incorporation by reference. Technically revival restores a revoked will or codicil; republication confirms an unrevoked testamentary instrument and makes it operate as if executed as at the date of the republication;⁵ while in the case of incorporation by reference an instrument which never was testamentary in character is made a part of a validly executed will or codicil.⁶

Under the common law there was no set form for republication or even revival. But now in England and in most of the American

⁷ Where valid remainders, contingent or vested, are found, termination should not be decreed. *Crackanthorpe v. Sickles*, supra, n. 6; *Sands v. Old Colony Trust Co.* (1907), 195 Mass. 575, 81 N. E. 300; *Skeen v. Marriott* (1900), 22 Utah, 73, 61 Pac. 296; *Kraft v. Neuffer* (1902), 202 Pa. 558, 52 Atl. 100; *Lovett v. Farnham*, supra, n. 3.

¹ Cal. Civ. Code, § 1300. Prior to 1905 such was not the case as respects the will of a married woman. *Estate of Comassi* (1895), 107 Cal. 1, 40 Pac. 15.

² Cal. Civ. Code, § 1299.

³ (Feb. 28, 1916), 51 Cal. Dec. 290, 155 Pac. 1002.

⁴ *Payne v. Payne* (1861), 18 Cal. 291, 302.

⁵ *Estate of Cutting*, supra, n. 3; *Estate of McCauley* (1903), 138 Cal. 432, 71 Pac. 512; *Estate of Ladd* (1892), 94 Cal. 670, 30 Pac. 99; *Payne v. Payne*, supra, n. 4.

⁶ See 2 California Law Review, 164. In *Estate of Plumel* (1907), 151 Cal. 77, 90 Pac. 192, 121 Am. St. Rep. 100, the court notes that there is a difference between incorporation by reference and republication.

states republication must be a formal act. It is well established that a codicil, properly executed, may republish the will to which it refers.⁷ Such by statute is the rule in this state.⁸ An olographic codicil would no doubt republish an attested will, inasmuch as it has been held⁹ that an olographic codicil may revoke such a will. But can a conditional codicil, once valid and dispositive, but now ineffective because the condition has passed, republish the will? On principle it seems that such an instrument could even revive a will or "incorporate by reference," for it supplies the testamentary intent and the requisite formalities of execution, though its own dispositive effect has disappeared.¹⁰

The effect of the republication of a will by a codicil is in general to bring the will down to the codicil and make it speak as of that date,¹¹ the will and the codicil being "construed as . . . a single instrument executed at the date of the codicil."¹² This is the general rule and was of extreme importance under the early common law where its effect was to pass lands acquired after the time of the actual making of the will, which would not otherwise pass even though general words were used. The republication applies to the whole will and not merely to the provision referred to by the codicil.¹³ If the will which is thus republished had codicils added to it the presumption arises that the testator meant to ratify and confirm the will as amended by such codicils, and the codicils also are republished.¹⁴ The fact that the will republished speaks as of the date of the codicil may have an important consequence when taken in conjunction with the kindred doctrine of incorporation by reference. Thus if the will refers to a paper as existing which is not then in fact in existence, such paper will not be incorporated into the will even though it is subsequently placed with the will;¹⁵ but if it does exist at the time of the making

Estate of Willey (1900), 128 Cal. 1, 8, 60 Pac. 471; Estate of Young (1899), 123 Cal. 337, 342, 55 Pac. 1011; *In re Shillaber* (1887), 74 Cal. 144, 15 Pac. 453, 5 Am. St. Rep. 433.

⁷ *In re Campbell* (1902), 170 N. Y. 84, 62 N. E. 1070; *Linnard's Appeal* (1880), 93 Pa. St. 313, 39 Am. Rep. 153.

⁸ Cal. Civ. Code, § 1287.

⁹ Estate of Soher (1889), 78 Cal. 477, 479, 21 Pac. 8. Statutes cause decisions to vary here. See *Parker v. Hill* (1908), 85 Ark. 363 108 S. W. 208.

¹⁰ See *Payne v. Payne*, supra, n. 4; *Goods of Da Silva* (1861), 2 Sw. & Tr. 315, 30 L. J., P. 171, 5 L. T. 140.

¹¹ Estate of Hayne (1913), 165 Cal. 568, 138 Pac. 881; Estate of Ladd, supra, n. 5; *Payne v. Payne*, supra, n. 4.

¹² Estate of Ladd, supra, n. 5; See also Estate of Barclay (1908), 152 Cal. 753, 759, 93 Pac. 1012. "The two are to be read together so as to make one consistent whole."

¹³ Estate of Ladd, supra, n. 5.

¹⁴ *Manship v. Stewart* (1914), 181 Ind. 299, 104 N. E. 505.

¹⁵ Under the rule of *Allen v. Maddock* (1858), 11 Mo. P. C. 427, 14 Eng. Rep. R. 757, which is the law in this state. See cases cited, supra n. 6.

of the codicil, it will be incorporated into the will¹⁶ since the will is regarded as speaking of the date of the codicil.

To the rule that the will republished speaks of the time of the codicil there are however certain exceptions. The republication will not revive a legacy which has been revoked, adeemed or satisfied.¹⁷ It will not change the meaning of the will.¹⁸ Nor is the date of the execution of the will which is republished to be regarded as of the date of the codicil. In the *Estate of McCauley*,¹⁹ where to consider that the time of the execution was as of the date of the codicil would have been to make void a bequest to a charitable institution, the codicil having been executed less than thirty days before the testator's death, the court, declaring that the will republished spoke as of the time of the codicil "for some purposes" but not for all,²⁰ held that the date of the execution of the will was the date of its execution in fact.

M. W.

¹⁶ *Goods of Truro* (1866), L. R. 1 P. & D. 201.

¹⁷ *Green v. Tribe* (1878), 9 Ch. Div. 231; *Tanton v. Kelley* (1897), 167 Ill. 129, 47 N. E. 376. See *Estate of Hayne* (1913), 165 Cal. 568, 130 Pac. 881, where republication of a will in which there was a provision which noted that son had received his share by advancement was read as of the time of the codicil, though his share at that time would have been larger.

¹⁸ See case put in *Stilwell v. Mellersh* (1851), 20 L. J. Ch. 356, 361.

¹⁹ (1903), 138 Cal. 432, 71 Pac. 512.

²⁰ Thereby restricting the following language in *Estate of Ladd*, *supra*, n. 5, the "original will and codicil are to be considered as a single instrument, executed as at the date of the codicil."